IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

NATIONAL LAWYERS GUILD, SAN FRANCISCO BAY AREA CHAPTER, Plaintiff and Respondent, vs. CITY OF HAYWARD, et al., Defendants and Appellants.	)	**No. S252445** Court of Appeal No. A149328 Alameda County Superior Court, Case No. RG15-785743 (Hon. Evelio Grillo)

AFTER A DECISION OF THE COURT OF APPEAL
FIRST APPELLATE DISTRICT
DIVISION THREE

RESPONDENT'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS OF LEAGUE OF CALIFORNIA CITIES, ET AL., AND EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION

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I. *The Workload Faced by Amici and Their Constituent Agencies is Imposed by the Public Records Act and the California Constitution*

Both the League of California Cities and Education Legal Alliance briefs lean heavily on their view of appropriate public policy that would serve to mitigate the Public Records Act workload.[1]

While amici advance their view of what public policy under the California Public Records Act ought to be, they barely acknowledge that the workload their constituents face is the result of the Act and the California Constitutional provision mandating public access to public records. They also fail to acknowledge that until the City of Hayward charged the Lawyers Guild for redacting the police videos in this case, public agencies throughout California did not routinely rely on Gov. Code section 6253.9(b)(2) to mitigate the burden of redacting electronic information, despite the fact the statute was fifteen years old when Hayward first invoked it in 2015.

The League of California Cities Brief at 25 argues "the CPRA should provide a reasonable framework for California public agencies

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[1] Throughout this Answer, we will refer to the joint brief of the California League of Cities et al., as the League of California Cities Brief. We will refer to the brief of amicus Education Legal Alliance of the California School Boards Association as the Education Legal Alliance Brief. Statutory references are to the Government Code unless otherwise noted.

to balance disclosure of records with their central governmental function of providing myriad government services to a growing number of residents." This contention, and most that follow, really concerns the burden imposed by Public Records Act requests generally.

The Legislature has, however, explicitly said the burden is "fundamental and necessary" to a democratic society. Gov. Code section 6250. And the people endorsed the burden when they added article. I, section 3(b), to the California Constitution in 2004. In fact, as the League of California Cities recognizes, the Legislature recently added to the burden by enacting Assem. Bill No. 748 (2017-2018 Reg. Session) (access to police videos of critical incidents) and Sen. Bill No. 1421 (2017-2018 Reg. Session) (access to certain police personnel records). *See* Pen. Code § 832.7(b)(1). League of California Cities Brief at 26. The Legislature added an additional burden by requiring redaction of parts of the Assem. Bill No. 748 and Sen. Bill No. 1421 records. Gov. Code § 6254(f)(4)(B)(i); Pen. Code §§ 832.7(b)(5) and 832.7(b)(6).

To the extent that amici argue access to electronic records, including police videos, imposes an increasing burden on them, their remedy is to go back to the Legislature and seek relief. Achieving legal changes to address workload issues related to the redaction of electronic records cannot be accomplished through a distorted process of statutory interpretation that shifts the burden of costs away from government agencies and on to individual requesters, most of whom

who cannot afford the cost of the redactions public agencies are required to make by law, or that are permitted by exemptions to mandatory disclosure. Gov. Code section 6254. As the court of appeal presciently recognized forty years ago, speaking of redaction: "Undoubtedly, the requirement of segregation casts a tangible burden on governmental agencies and the judiciary. Nothing less will suffice, however, if the underlying legislative policy of the PRA favoring disclosure is to be implemented faithfully. If the burden becomes too onerous, relief must be sought from the Legislature." *Northern California Police Practices Project v. Craig* (1979) 90 Cal. App. 3d 116, 124.

If there is tension between workload burdens and redaction expenses imposed on the public "conflict between the public policies is resolved by applying the constitutional directive favoring public access to information. (Cal. Const., art. I, § 3, subd. (b), par. (2).)" *POET, LLC v. State Air Resources Board* (2013) 218 Cal. App. 4th 681, 752.[2]

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[2] The California Education Alliance Brief at 18-19 contends that we have failed to cite any examples where Proposition 59, adding Art. I, sec. 3(b) to the California Constitution, has been used to assist in the interpretation of the Public Records Act other than to determine whether records are exempt from disclosure. However, art. I, sec. 3(b)(2) is not limited to such interpretations. The *POET, LLC* opinion correctly relied on Art. I., section 3(b)(2) to interpret rulemaking provisions of the Administrative Procedure Act. 218 Cal. App. 4th at 750, 752. *California Public Records Research, Inc. v. County of Stanislaus* (2016) 246 Cal.App.4th 1432, 1452 applied section 3(b) to (continued...)

II. *Extraction to Produce Data or Information in a Tangible Form Is Within the Scope of the Public Records Act*

The League of California Cities and the Education Legal Alliance contend that our definition of 'extraction' as used in Gov. Code section 6253.9(b) would require the creation of new records and that this is not consistent with the Public Records Act. League of California Cities Brief at 20, n. 5 and 22; Education Legal Alliance Brief at 30-31. Therefore, they argue that the term extraction should be construed in a manner that only contemplates existing public records in their original tangible form. But what amici fail to recognize is that "public record" is a broad term that is not restricted to a single tangible form. It consists of information or data. A record is a presentation of "information" "regardless of physical form or characteristics." Gov. Code section 6252(e).[3]

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[2](...continued)
determination of costs charged by a county recorder, but stating that costs are one factor affecting access under the circumstances.

Nothing in section 3(b) indicates its application is confined to Public Records Act exemption provisions.

[3] Section 5252(e) provides: "'Public records' includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency *regardless of physical form or characteristics*. "Public records" in the custody of, or maintained by, the Governor's office
(continued...)

The Public Records Act plainly requires access to "information" and "data" found within "writings.[4] The focus of the Act is on information, not documents. *Northern California Police Practices Project v. Craig,* 90 Cal. App. 3d at 123. *See, e.g.*, Gov. Code sections 6250 ("access to *information* concerning the conduct of the people's business is a fundamental and necessary right of every person in this state"); section 6252(e) ("'Public records' includes any writing containing *information* relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency *regardless of physical form or characteristics*"); section 6253(a)(4) (providing additional time to respond to a request when it requires "[t]he need to compile *data*, to write programming language or a computer program, or to construct a computer report to extract *data"*); section 6253.1(a) (a requester shall be assisted by the public entity in identifying *the information or record(s)*; section 6253.9(a) ("any agency that has *information* that constitutes an identifiable

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[3](...continued)
means any writing prepared on or after January 6, 1975." (Emphasis added.)

[4] Section 6252(g) provides: "''Writing'" means any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, *and any record thereby created*, regardless of the manner in which the record has been stored. (Emphasis added.)

public record not exempt from disclosure pursuant to this chapter that is in an electronic format shall make that *information* available in an electronic format when requested"); section 6253.9(b)(2) (requester to pay costs when there is a "need to *compile data*, to write programming language or a computer program, or to construct a computer report *to extract data*."). Emphasis added.

The objective of the Act is the disclosure of information and data, not necessarily whole records. *Northern California Police Practices Project v. Craig*, 90 Cal. App. 3d at 124; Gov. Code section 6253(a). The wording of section 6253.9(b) contemplates "the cost to construct a record," and section 6253.9(b)(2) contemplates "data compilation, extraction, or programming to produce the record." The statute, therefore, includes the production of data extracted from records and produced in a tangible form. This is not the creation of a "new" record outside the scope of the Public Records Act because the data and information already exist.

It is not uncommon for information and data to be extracted from existing records and compiled in order to fulfill a Public Records Act request. This does not constitute the creation of a new record, but rather the disclosure of existing information. *See Sander v. Superior Court* (2018) 26 Cal.App.5th 651, 667 (distinguishing "searching, extracting, compiling or redacting electronically stored data, which our state and federal public access laws require, and creating new records, which they do not."). The problem addressed in the *Sander* opinion, which held that State Bar applicant data is outside the scope

of the Act, is that fulfilling the Public Records Act request would have required anonymization and re-identification of manipulated information and data in a form that did not already exist in the records. *Id*. at 666-668.[5]

California case law recognizes that extracting *existing* information and data and producing it in a tangible form is within the scope of the Public Records Act. For example, *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319 holds that the

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[5] *Sander* cited the following federal cases that have addressed this distinction. "*Schladetsch v. U.S. Dept. of H.U.D* (D.D.C. 2000) 2000 WL 33372125 [programming necessary to perform computer search to extract and compile data did not amount to creating a new record]; *International Diatomite Producers Ass'n. v. U.S. Social Security Admin*. (N.D. Cal.1993) 1993 WL 137286 [redaction and segregation of data is not equivalent to creating a new record]; *Osborn v. Board of Regents of University of Wisconsin System* (Wis. 2002) 254 Wis. 2d 266, 299–302, 647 N.W.2d 158 [extraction and compilation to segregate exempt from non-exempt data]; *Bowie v. Evanston Community Consol. School Dist. No.* (Ill. 1989) 128 Ill.2d 373, 376, 382, 131 Ill.Dec. 182, 538 N.E.2d 557 [holding that disclosing student test scores in a 'masked and scrambled format' did not create a new record].)" *Id.* at 667.

See also National Security Counselors v. C.I.A. (D.D.C. 2012) 898 F.Supp.2d 233, 270 [2012 WL 4903377] ("[A]n agency need not create a new database or a reorganize its method of archiving data, but if the agency already stores records in an electronic database, searching that database does not involve the creation of a new record. Likewise, sorting a pre-existing database of information to make information intelligible does not involve the creation of a new record").

names and salaries of public employees earning more than $100,000 per year must be disclosed under the Public Records Act. Throughout the opinion the Court refers to this "information" and there is no indication production of the information is not required because compilation would create a new record.

In *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal. 4th 278, 284 the Court required the Commission to disclose the names, employing departments, and hiring and termination dates of California peace officers included in the Commission's database. *See id.* at 286 ("the Los Angeles Times requested that the Commission release information in its database pertaining to all new appointments dating from 1991 through 2001. The information requested was the officer's name and birth date, employing department, appointment dates, termination dates, and reason for termination."); *See also Haynie v. Superior Court* (2001) 26 Cal.4th 1061, 1072 (construing Gov. Code section 6254(f)(2) to require disclosure of information taken from broader records);[6] *Fredericks v. Superior Court* (2015) 233 Cal.App.4th 209, 232-233 (information extracted from law enforcement arrest records); *CBS*

[6] The Education Legal Alliance Brief at 30-31 relies on *Haynie* for the proposition that an agency may not be required to create a new record. But the portion of *Haynie* amicus relies on discusses and dismisses a very specific requirement to prepare a prelitigation list and description of every document withheld as exempt from disclosure, holding that the Public Records Act does not impose this specific requirement. *Haynie*, 26 Cal.4th at 1073-75.

Broadcasting Inc. v. Superior Court (2001) 91 Cal. App. 4th 892, 909 (production of accurately compiled list of persons in Los Angeles County with criminal convictions working in daycare facilities*)*; *County of Los Angeles v. Superior Court* (*Kusar*) (1993) 18 Cal.App.4th 588 (information extracted from law enforcement arrest records).

III. *Redacting Records and Extracting From Records Are Legally and Functionally Different*

The Education Legal Alliance attempts to undermine one of the examples of an extraction in our reply brief on the merits – video highlights of a 32 minute high school basketball game. Notably, amicus does not say anything about the other example provided – video excerpts of a police incident showing a gun shot fired at a suspect. See Reply Brief on the Merits at 17.[7]

The Education Legal Alliance Brief challenges the basketball highlights video on several grounds. First, it argues that this type of

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[7] Other examples of extractions come to mind, such as excerpts of information taken out of videos of multiple city council meetings, showing the discussion of a singular agenda topic, such as a zoning issue. A request for information showing all salaries of persons working at a county hospital, with dates of hire, would be an extraction, as would a request for traffic collision information held by a city involving a single intersection. A requester could ask for all traffic collision information held by a city or town, and, if the information is in electronic form, ask the city to extract the data using particular parameters. The later data would likely fall within section 6253.9(b)(2) because extraction is necessary to produce a copy of the record.

extraction would require the creation of a new record, which is not required by the Public Records Act. *Id.* at 30-31. But production of the highlights would not require creation of a new record, simply the disclosure of existing portions of information taken from the full 32 minute video. There would not be any alteration of the original information.

Second, amicus argues that there is no difference between redacting 40 minutes out of a 42 minute video and extracting two out of 42 minutes of video. Education Legal Alliance Brief at 31. On the surface this is a creative argument, but the text of section 6253.9(b)(2) clarifies the distinction. Sections 6253.9(b) and 6253.9(b)(2) allow an agency to charge a requester for the cost of extraction when extraction is *necessary* to produce the record. When redaction is performed information is deleted from the record. The original information exists in its tangible form. On the other hand, when extraction occurs, construction is necessary to produce the information in tangible form.

Third, the terms of section 6253.9(b)(2) only pertain when compilation, extraction or programming are necessary for constructing or producing the existing information in a new tangible form. Redaction is not "necessary" to produce a record. And, despite the Education Legal Alliance arguments to the contrary, redaction is not required to produce the record. Redaction may be legally required in some instances to meet other statutory requirements, such as the confidentiality of pupil and student records, but it is not required or

necessary to produce the record by putting it into comprehensible form.

Thus, a request that asks for highlights of a basketball game, would make it necessary to extract information to produce the record and fulfill the request for the highlights information. The requester would initiate the process by asking for specified data, putting a burden on the agency to go about the process of extracting it. The requester controls the scope and extent of the responsive information.

A requester would not control redactions. When an agency chooses to make redactions, it initiates the process because it is compelled by law to do so, as in the privacy context, or because it has discretion to so by other exemptions to the Public Records Act. "Even where the Public Records Act permits nondisclosure, it does not require withholding the requested information." *American Civil Liberties Union Foundation of Northern California v. Deukmejian* (1982) 32 Cal. 3d 440, 458. *See* Gov. Code section 6254; *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1306; *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 652.

In these instances the requester has little control over the redactions that an agency will make or the number of the redactions. When records are redacted the burden is not initiated or created by the requester, but by the agency. In most cases, the requester will have not control and will not even know what redactions were made, how many were made, or whether the redactions are justifiable, unless the requester pays the redacting costs to receive a copy of the electronic

record. The distinction between extraction and redaction recognizes the difference.

The Education Legal Alliance's final point in this portion of the argument is that in enacting section 6253.9 the Legislature used terms that could cover technology not contemplated at the time and therefore meant compilation, extraction, and programming to be construed in their most expansive manner, including redactions. *Id*. at 32. But a problem with this argument is that the California Constitution Article I, sec. 3(b)(2) requires that the terms be construed narrowly, when as here, one interpretation reduces public access. This application of section 3(b)(2) includes the interpretation of statutes that predated the addition of the constitutional mandate in 2004. *Id.* ("A statute, court rule, or other authority, *including those in effect on the effective date of this subdivision*, shall be . . . narrowly construed if it limits the right of access.)(emphasis added).

The Education Legal Alliance Brief concedes that charging for the cost of redactions is likely to reduce access to public records.[8] Education Legal Alliance Brief at 40. Thus, the Education Legal Alliance argument ignores the constitutional mandate that a statute,

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[8] Taking snippets of our reply brief on the merits out of context, the Education Legal Alliance Brief at 40 also argues that we are advocating "free" access to copies of public records. Of course, we are not making such an assertion because the Public Records Act is clear that agencies may charge the direct costs of duplicating a record in some situations and may also charge for the costs of " data compilation, extraction, or programming to produce the record." *See* Gov. Code sections 6253(b), 6253.9(a)(2), 6253.9(b).

such as this one, which it admits lessens access shall be "narrowly construed if it limits the right of access." Cal. Const. art. I, section 3(b)(2).

Further, the term "redaction" was well known and had a well understood meaning at the time the section was enacted. It was raised by some opponents of the legislation (as admitted in the Education Legal Alliance Brief at 36). And it was a familiar legal term of art long before the year 2000 when section 6253.9 was added to the Public Records Act. *See* Opening Brief on the Merits at 39-41 and 40, n. 13; Reply Brief on the Merits at 24-26. If the Legislature meant for section 6253.9(b)(2) to cover the redaction of electronic records, it could have said so. There is no indication that the Legislature intended the term extraction to be construed to cover redactions.[9]

IV. *Charging for Redactions Will Have a Gatekeeping Effect that Will Limit Public Access and Is Inconsistent with the Purpose of the Act*

Amici admit that allowing charges for the cost of redaction will have a gatekeeping effect on access to public records. They contend that charging "fees and costs serve[s] an important purpose because they help prevent overly broad and wasteful 'fishing expeditions.'"

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[9] In Part VII of the Opening Brief on the Merits, we contend that Hayward had no authority to make the Lawyers Guild pay the cost of searching for and locating the responsive videos. Opening Brief on the Merits at 64. In arguing that costs of redaction can be charged to a requester, the Education Legal Alliance admits that "costs for locating records is one borne completely by the agency[.]" Education Legal Alliance Brief at 14.

League of California Cities Brief at 26; Education Legal Alliance Brief at 40.[10] Of course, such charges also prevent access even when a request is narrow, when, as in most instances, the requester cannot afford the redaction costs, such as the $3,246.47 for the police videos in this case.

But even if deterrence of overbroad requests for redacted electronic records were a justifiable goal endorsed by the Public Records Act itself, the Act already includes at least two mechanisms that protect against overly burdensome requests. Government Code section 6253.1(a) requires an agency to work with a requester to help make "a focused and effective request that reasonably describes an identifiable record or records." Section 6255(a) allows balancing the burden imposed by the scope of the request against the public interest in disclosure. *See American Civil Liberties Union Foundation of Northern California v Deukmejian,* 32 Ca1.3d 440.

What is particularly troubling about amici's argument is that user fees are not permissible under the Act for access to paper records and other non-electronic records or for the inspection of records, regardless whether they are redacted or not. In other words, amici would have this Court convert a statute, Gov. Code section 6253.9, which was enacted with the intention to keep the price of public

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[10] *See also id*. at 31 ("Government efficiency and provision of services to citizens will suffer if public agencies are forced to respond each year to thousands of 'fishing expedition' CPRA requests with limited resources to hire additional public records personnel or obtain new software to assist such effort.")

access to copies of public records low,[11] into a gatekeeping mechanism that would lock out requesters and reduce the burden on public agencies.

To buttress their claim that the burden imposed by the Public Records Act is excessive, the League of California Cities conducted a survey of public entities that they summarize in their brief. League of California Cities Brief at 28-31. While the summary is replete with statistics and numbers, amici fail to provide any means of verifying this information. *Id.* at 28. They attribute the findings, for example, to "Sacramento Police Department staff," p. 28, "a program analyst," p. 28, n. 12, "a Sheriff's Lieutenant," p. 29, n. 13, "legal affairs division of Los Angeles Police Department," p. 30, n. 14, "a program manager," "an attorney" and a police records manager. *Id*. at 30-31, nn. 15-18. Amici have not provided the Court with any citations, records, or names of their informants. Without more, the data is not judicially noticeable and there is no way to verify or test it. The summary should be disregarded by the Court.[12]

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[11] See League of California Cities Brief at 14; Sen. Judiciary Com., Bill Analysis, Assem. Bill No. 2799 (1999-2000 Reg. Session), June 27, 2000, p. 3.

[12] Similarly, the League of California Cities Brief at 35 attributes a quotation to this Court characterizing the burden of Public Records Act requests as "daunting." Although the quotation can be found in opinion cited, *Ardon v. Superior Court* (2016) 62 Cal. 4th 1176, 1189, the quotation is actually taken from an argument made by the League of California Cities repeated by the Court within

(continued...)

V. *The Operative Terms of Section 6253.9(b)(2) Have Different Meanings, None of Which Include Redaction*

The Education Legal Alliance argues that we would have the Court conflate three substantive terms used by section 6253.9(b)(2) – compilation, extraction and programming. Education Legal Alliance Brief at 15, 29. That is not our argument. Our argument is succinctly set out in both the opening brief on the merits and the reply brief: "All three terms ("compilation, extraction, [and] programming") in section 6253.9(b)(2) are interrelated to signify complex, non-routine processes, that transform machine readable data into a tangible record or format." Opening Brief on the Merits at 35; *Cf*. Reply Brief on the Merits at 36. The Legislature would not have used three words to take the place of one word because the others would be redundant. Every one is intended to have meaning. *Plantier v. Ramona Municipal Water District* (2019) 7 Cal.5th 372, 247 ("Interpretations that render

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[12](...continued)
quotation marks.

The Education Legal Alliance Brief characterizes statements that include the term "redaction" in *Fredericks v. Superior Court,* 233 Cal. App. 4th at 238 and *Sander v. Superior Court,* 26 Cal. App. 5th at 669 as legal holdings. They are not. *Fredericks* used the term redaction in its discussion of a remedy on remand, discussing charges that "may be" permissible. Whether the cost of redaction may be charged was not an issue presented in the case. *Sander* presented the issue whether the State Bar could be compelled to produce anonymous data about Bar applicants. The point of the case was not whether agencies can charge for redaction of records.

statutory language meaningless are to be avoided."); *White v. County of Sacramento* (1982) 31 Cal.3d 676, 681.

There is a big difference between giving words redundant meaning and interpreting related words in a series. *See Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 169, quoting *Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1011–1012 ("'[W]hen a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope. [Citations.] In accordance with this principle of construction, a court will adopt a restrictive meaning of a listed item if acceptance of a more expansive meaning would make other items in the list unnecessary or redundant, or would otherwise make the item markedly dissimilar to the other items in the list.'").

In this respect, we agree with the Education Legal Alliance Brief at 29, that the terms of section 6253.9(b)(2) have different meanings. Where we differ, however, is whether the terms help to define one another – giving the term "extraction" similar properties as "data compilation" and "programming" – complex non-routine processes, that transform machine readable data into a tangible record or format.

VI. *Even If Educational Agencies Face Unique Challenges, Those Challenges Should Not Form the Basis for Interpreting the Statute Broadly*

Repeatedly, the Education Legal Alliance brief contends that school districts and county boards of education face "unique"

challenges and create "additional burdens" above and beyond those faced by most public agencies. Education Legal Alliance Brief at 2, 3, 13, 15, 23, 26. While it may be true with respect to "student records" and "pupil records" that agencies are prohibited from disclosing (20 U.S.C. section 1232g(b)(1), Ed. Code section 49076), it is highly unlikely that the public will seek access to school and pupil records on the same scale that it may seek access to police records. In fact, the Education Legal Alliance fails to say what portion of the estimated 25,000 requests directed to school boards each year actually implicated pupil records, rather than personnel, budget, policy, and other subjects.[13]

The Education Legal Alliance does not say that education agencies have previously interpreted section 6253.9(b)(2) to allow them to charge for redaction of pupil and student records required by state and federal law. Section 6253.9(b) is not a new statute. The Education Legal Alliance does not say public school districts and county boards of education have relied on the statute or on such reimbursements in the years since section 6253.9(b) was added to the

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[13] According to the California Department of Education, as of fiscal year 2017-2018, there were 1,026 school districts in California, 10,473 public schools, including charter schools, and 6,220,413 public school students. *See* California Department of Education, Fingertip Facts on Education in California - CalEdFacts (https://www.cde.ca.gov/ds/sd/cb/ceffingertipfacts.asp (as of July 10, 2019). When the estimated 25,000 Public Records Act requests are compared to the number of districts, schools, and students, the number of requests does not appear to be surprising or excessive.

Public Records Act. They are hardly now in a position 19 years later to contend such reimbursements are uniquely necessary and within the scope of section 6253.9(b)(2). *Cf. First National Bank v. Kinslow* (1937) 8 Cal.2d 339, 346 (Court considered understanding of statutory meaning over many years as a contemporaneous construction.).[14]

But even if the number of requests implicating student and pupil records is as great as the Education Legal Alliance contends, that is not a reason to construe section 6253.9(b)(2) in a manner that would grant the same policy accommodation – expanding the term extraction to include redactions – to all public agencies in the State and to police videos. Indeed, the Education Legal Alliance Brief at 15 admits it is unlikely most educational agencies are would face the same requests for police videos that are at issue in this case.

Further, if it is correct that education agencies face unique challenges with respect to redactions, and if this Court were to construe section 6253.9(b)(2) to allow education agencies to charge requesters to redact pupil and student information, the cost of public access would likely make school agencies practically immune from "public scrutiny" as otherwise required by Cal. Const. art. I, sec.

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[14] "The 'contemporary construction' of a statute to which the court looks in an attempt to ascertain legislative intent is not limited to that applied simultaneously with the enactment of the measure. A consistent application of a statute for many years after its enactment may also be looked to as contemporaneous construction." *Rossi v. Brown* (1995) 9 Cal.4th 688, 700, n. 6.

3(b)(1). This would be especially true of families having the most stake in public education who could not afford the price of access.

The solution is not to give the word "extraction" a meaning that is meant to cover the unique redaction obligation facing education agencies, but for the agencies to seek unique relief from the Legislature. "If there is a hole in the statutory scheme, [they have] to go to the Legislature for a patch." *Raygoza v. County of Los Angeles* (1993) 17 Cal.App.4th 1240, 1247; *Cf. Osborn v. Hertz Corp*. (1988) 205 Cal.App.3d 703, 711 ("we think that the veracity of these assertions, . . . are matters properly resolved on the other side of Tenth Street, in the halls of the Legislature"). This would allow the Legislature to weigh the professed burden on the education agencies against the undoubted effect of closing off most access to records to those families, journalists, and members of the public who cannot afford to pay.

Given the current text of the Public Records Act, as routinely amended, such a legislative request would not be unusual. The Public Records Act includes countless special exemptions to its general provisions. *See, e.g.*, Gov. Code section 6253.2(a) (exempting information pertaining to state paid in home support services workers); section 6253.5 (exempting voter petitions); section 6253.6 (exempting records concerning persons requesting bilingual ballots); section 6253.10 (exempting school districts from posting requirements pertaining to Internet Resources [web pages]); section 6254(r) (exempting Native American burial records); section 6354(s)

(exempting final accreditation reports of the Joint Commission on Accreditation of Hospitals); section 6254(t) (exempting hospital districts from disclosing insurance contracts in the first year). Local educational agencies are exempt from a broader requirement that local agencies make publicly available information concerning their "enterprise systems." *See* Gov. Code section 6270.5(a).

In fact, sections 6254.11 through 6254.33 contain innumerable unique exceptions. Many exemptions include exemptions to the exemptions. *See, e.g*., 6254.26, 6254(f), 6254(t).

The Legislature has even prescribed specific cost recovery provisions related to some agencies. *E.g.,* Gov. Code section 27366 (allowing county boards of supervisors to set fees for copies of recorders' records); Veh. Code section 1811 ("The department [DMV] may sell copies of all or any part of its records at a charge sufficient to pay at least the entire actual cost to the department of the copies").

The interpretation of section 6253.9(b) should not be specially tailored to address unique assertions.

CONCLUSION

The judgment of the Court of Appeal should be reversed with directions to affirm the judgment of the Superior Court.

Dated: July 17, 2019

Respectfully submitted,
by:

Amitai Schwartz
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Respondent

National Lawyers Guild,
San Francisco Bay Area Chapter

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c))

The text of the foregoing Respondent's Consolidated Answer to Amicus Curiae Briefs of League of California Cities, et al., and Education Legal Alliance of the California School Boards Association consists of 5,476 words as counted by the Corel WordPerfect X8 word-processing program used to generate the brief.

Dated: July 17, 2019

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Amitai Schwartz
Attorney for Respondent

PROOF OF SERVICE BY MAIL

Re: *National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward, et al.*, California Supreme Court, No. S252445

I, Amitai Schwartz, declare that I am over 18 years of age, and not a party to the within cause; my business address is 2000 Powell Street, Suite 1286, Emeryville, CA 94608. I served a true copy of the

RESPONDENT'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS OF LEAGUE OF CALIFORNIA CITIES, ET AL., AND EDUCATION LEGAL ALLIANCE OF THE CALIFORNIA SCHOOL BOARDS ASSOCIATION

on the following, by placing a copy in an envelope addressed to the party listed below, which envelope was then sealed by me and deposited in United States Mail, postage prepaid at Emeryville, California, on July 17, 2019.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 17, 2019, 2019.

_____
Amitai Schwartz